LIM JEN HSIAN & ANOR v. KETUA PENGARAH JABATAN PENDAFTARAN NEGARA & ORS

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
BADARIAH SAHAMID JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-01(A) 391-12-2015]
16 MARCH 2017

ADMINISTRATIVE LAW: *Judicial review – Application for – Citizenship of child – Illegitimate child – Child born to Malaysian biological father and Thai biological mother – Requirement of citizenship by jus soli and jus sanguinis – Whether child acquired citizenship of biological mother – Whether requirements under s. 1(e) of Part II, Second Schedule of Federal Constitution fulfilled – Whether child entitled to citizenship by operation of law*

CONSTITUTIONAL LAW: *Citizenship – Application – Illegitimate child – Child born to Malaysian biological father and Thai biological mother – Requirement of citizenship by jus soli and jus sanguinis – Whether satisfied – Whether child acquired citizenship of biological mother – Whether proven 'not born a citizen of any country' – Whether requirements under s. 1(e) of Part II, Second Schedule of Federal Constitution fulfilled – Whether child entitled to citizenship by operation of law*

The second appellant was born on 6 October 2010 in Kuala Lumpur. His biological mother ('Rai Putta') was a citizen of Thailand whilst his biological father was the first appellant, a Malaysian citizen. The first appellant and Rai Putta were never married and/or had not registered their marriage. Subsequently, the first appellant and Rai Putta separated when Rai Putta returned to Thailand, leaving the second appellant under the care of the first appellant. The first appellant applied for the second appellant's citizenship under art. 15A of the Federal Constitution ('FC') but the application was dismissed. The first appellant thus obtained leave to apply for judicial review. The issues raised before the High Court in the judicial review application were: (i) whether the appellants had fulfilled the requirements to obtain citizenship by operation of law as stipulated by art. 14(1)(e) of the FC; and (ii) whether the issue in the judicial review application was non-justiciable under Part III, Second Schedule of the FC. The High Court dismissed the appellants' application holding that the matter surrounding judicial review application concerned a decision made pursuant to Part III of the FC, a matter which is non-justiciable. The High Court also found that the appellants had failed to satisfy the requirements of s. 1(e) of Part II of the Second Schedule of the FC. Hence, this appeal.

Held (dismissing appeal)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) The ouster provision in the Schedule to the FC did not preclude the court from entertaining the application for an order of *certiorari*. Whether the grounds for an order can be established and whether the application for *certiorari* will succeed are matters to be decided in the substantive motion itself. Thus, s. 2 of Part III of the Second Schedule to the FC does not absolutely preclude the jurisdiction of the court. (paras 24 & 25)

(2) Article 14(1)(b) of the FC encapsulates the requirement of citizenship by *jus soli ie* by the place of birth; while s. 1(e) of Part II of the Second Schedule of the FC encapsulates the requirement of citizenship by *jus sanguinis ie* by blood or lineage. The second appellant had to satisfy both the requirements of *jus soli* and *jus sanguinis* in order to fulfil the requirements of art. 14(1)(b) and s. 1(e) of Part II, Second Schedule of the FC. The second appellant was born after Merdeka Day in the Federation in Kuala Lumpur, Malaysia, thus, fulfilling the requirement of *jus soli* in art. 14(1)(b) of the FC. (paras 27, 28 & 31)

(3) The second appellant's lineage would only be traceable to his Malaysian biological father provided that his parent was in a lawful marriage. In the case of an illegitimate child, the word 'parent' is construed to refer to his biological mother. Therefore, although the second appellant was born in the Federation, he did not acquire citizenship from his Malaysian biological father. He acquired the citizenship of his biological mother who was a Thai national. Thus, he could not be said to be one 'who is not born a citizen of any country' pursuant to s. 1(e) of Part II, Second Schedule of the FC. (paras 36-40)

(4) Pursuant to s. 103 of the Evidence Act 1950, the burden of proof was on the appellants to establish on the balance of probabilities that the second appellant 'was not born a citizen of any country'. The burden would only shift to the respondents to prove positively that the second appellant was born a citizen of a foreign country once the appellant had established a *prima facie* case. However, the appellants had failed to prove a *prima facie* case that the second appellant was 'not born a citizen of any country' and therefore, the burden of proof had not shifted to the respondents. Thus, the issue of whether expert opinion is required by the respondents to prove that the second appellant had acquired Thai citizenship at birth did not arise. The second appellant had thus failed to satisfy the requirements stipulated in s. 1(e) of Part II, Second Schedule of the FC, to obtain citizenship by operation of law. (paras 33, 35, 41 & 42)

***Bahasa Malaysia** Headnotes*

Perayu kedua lahir pada 6 Oktober 2010 di Kuala Lumpur. Ibu kandungnya ('Rai Putta') adalah warganegara Thailand manakala bapa kandungnya adalah perayu pertama, warganegara Malaysia. Perayu pertama dan Rai Putta tidak pernah berkahwin dan/atau tidak mendaftarkan perkahwinan mereka. Kemudian, perayu pertama dan Rai Putta berpisah apabila Rai Putta kembali ke Thailand, meninggalkan perayu kedua di bawah jagaan perayu pertama. Perayu pertama memohon kewarganegaraan perayu kedua di bawah per. 15A Perlembagaan Persekutuan ('Perlembagaan') tetapi permohonan tersebut ditolak. Perayu pertama, oleh itu, memperoleh kebenaran memohon semakan kehakiman. Isu-isu yang berbangkit di Mahkamah Tinggi dalam permohonan semakan kehakiman adalah (i) sama ada perayu-perayu telah memenuhi keperluan untuk mendapatkan kewarganegaraan melalui kuat kuasa undang-undang seperti yang termaktub dalam per. 14(1)(b) Perlembagaan; dan (ii) sama ada isu dalam permohonan semakan kehakiman tak boleh diadili bawah Bahagian III, Jadual Kedua Perlembagaan. Mahkamah Tinggi menolak permohonan tersebut dengan memutuskan bahawa perkara yang berkisar tentang permohonan semakan kehakiman berkait dengan keputusan yang dibuat bawah Bahagian III Perlembagaan, satu perkara yang tak boleh diadili. Mahkamah Tinggi juga mendapati bahawa perayu-perayu gagal memenuhi keperluan s. 1(e) Bahagian II, Jadual Kedua Perlembagaan. Dengan itu, rayuan ini.

Diputuskan (menolak rayuan)
Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Peruntukan penyingkiran dalam Jadual Perlembagaan tidak menghalang mahkamah melayani permohonan perintah *certiorari*. Sama ada alasan-alasan bagi satu perintah boleh dibuktikan dan sama ada permohonan *certiorari* akan berjaya adalah perkara-perkara yang perlu diputuskan dalam usul substantif itu sendiri. Oleh itu, s. 2 Bahagian III Jadual Kedua Perlembagaaan tidak menghalang bidang kuasa mahkamah secara mutlak.

(2) Perkara 14(1)(b) Perlembagaaan memasukkan keperluan kewarganegaraan melalui *jus soli* iaitu melalui tempat kelahiran; manakala s. 1(e) Bahagian II Jadual Kedua Perlembagaan memasukkan keperluan kewarganegaraan melalui *jus sanguinis* iaitu melalui hubungan darah atau keturunan. Perayu kedua perlu memenuhi kedua-dua keperluan *jus soli* dan *jus sanguinis* untuk memenuhi keperluan per. 14(1)(b) dan s. 1(e) Bahagian II Jadual Kedua Perlembagaaan. Perayu kedua dilahirkan selepas hari kemerdekaan dalam Persekutuan di Kuala Lumpur, Malaysia, dengan itu, memenuhi keperluan *jus soli* dalam per. 14(1)(b) Perlembagaan.

(3) Keturunan perayu kedua hanya boleh dikesan melalui bapa kandungnya, warganegara Malaysia, jika ibu bapanya berkahwin secara sah. Dalam kes anak luar nikah, perkataan 'ibu bapa' ditafsir sebagai merujuk pada ibu kandungnya. Oleh itu, walaupun perayu kedua dilahirkan dalam Persekutuan, dia tidak memperoleh kewarganegaraan daripada bapa kandungnya. Dia memperoleh kewarganegaraan ibu kandungnya yang merupakan warganegara Thai. Oleh itu, perayu kedua tidak boleh dikatakan 'pada masa dia lahir tidak menjadi warganegara mana-mana negara' menurut s. 1(e) Bahagian II, Jadual Kedua Perlembagaan.

(4) Menurut s. 103 Akta Keterangan 1950, beban pembuktian adalah pada perayu-perayu untuk membuktikan atas imbangan kebarangkalian bahawa perayu kedua 'pada masa dia lahir tidak menjadi warganegara mana-mana negara'. Beban tersebut akan hanya berpindah kepada responden-responden untuk membuktikan secara positif bahawa perayu kedua adalah warganegara yang lahir di negara lain sebaik sahaja perayu membuktikan kes *prima facie*. Walau bagaimanapun, perayu-perayu gagal membuktikan kes *prima facie* bahawa perayu kedua 'pada masa dia lahir tidak menjadi warganegara mana-mana negara' dan dengan itu, beban pembuktian tidak berpindah kepada responden-responden. Dengan itu, isu sama ada pendapat pakar diperlukan oleh responden-responden untuk membuktikan perayu kedua telah memperoleh kewarganegaraan Thai tidak berbangkit. Perayu kedua, oleh itu, gagal memenuhi keperluan yang termaktub dalam s. 1(e) Bahagian II, Jadual Kedua Perlembagaan untuk memperoleh kewarganegaraan melalui kuat kuasa undang-undang.

Case(s) referred to:

Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran dan Kematian Malaysia [2016] 1 CLJ 736 HC ***(refd)***

Foo Toon Aik v. Ketua Pendaftar Kelahiran dan Kematian, Malaysia [2012] 4 CLJ 613 HC ***(refd)***

Ku Luwante (An Infant) v. Government of Malaysia & Anor [1977] 1 LNS 49 HC ***(refd)***

Mak Sik Kwong v. Minister of Home Affairs, Malaysia [1975] 1 LNS 96 HC ***(refd)***

Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [2008] 5 CLJ 42 CA ***(refd)***

Singh v. Commonwealth of Australia [2004] HCA 43 ***(refd)***

Toh Whye Teck v. The Happy World Ltd [1953] 1 LNS 115 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 103

Federal Constitution, arts. 14(1)(b), 15A, Second Schedule Part II s. 1(e), Part III ss. 1, 2, 4, 17

Nationality Act [Thai], s. 7.6

For the appellants - N Surendran & Latheefa Koya; M/s Daim & Gamany
For the defendants - Mohamad Rizal Fadzil; AGC

[Editor's note: For the High Court judgment, please see Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2016] 7 CLJ 590 (affirmed).]

Reported by S Barathi

JUDGMENT

Badariah Sahamid JCA:

Introduction

[1] This is an appeal against the decision of the High Court in Kuala Lumpur dated 23 April 2015, which dismissed the appellants' application for judicial review. Leave to apply for judicial review was allowed on 14 July 2014 limited to the following prayers:

(i) A declaration that the second appellant is a citizen of Malaysia by operation of law under s. 1 (e) of the Second Schedule, Part II, and art. 14(1)(b) of the Federal Constitution; and

(ii) Order of *mandamus* to be issued to the first respondent to issue MyKid or certificate of citizenship to recognise the second appellant as a Malaysian citizen by operation of law under art. 14(1)(b) of the Federal Constitution.

Background Facts

[2] The salient facts of this case may be summarised from the learned High Court Judge's grounds of judgment. The second appellant was born on 6 October 2010 in Hospital Tung Shin, Kuala Lumpur, Malaysia. The second appellant's biological mother named Rai-Putta Thippawan ("Rai Putta") is a citizen of Thailand. (exh. A of encl. 10)

[3] The first appellant claims to be the biological father of the second appellant.

[4] The first appellant and Rai Putta were never married and/or had not registered their marriage at the first respondent's office.

[5] The first appellant claimed that the first appellant and Rai Putta were separated in April 2011 when Rai Putta returned to Thailand for good. Since then the second appellant had been under the care of the first appellant's mother.

[6] On 9 April 2011, the first appellant had for the first time applied for the second appellant's citizenship under art. 15A of the Federal Constitution. The application was dismissed by the Secretary General on 11 October 2014.

[7] The first appellant then filed encl. 1 and leave was granted limited to prayer (iii) of encl. 1.

A **The Issues Before The High Court**

[8] The issues raised for determination before the High Court are as follows:

(a) Whether the appellants have fulfilled the requirements to obtain
B citizenship by operation of law as stipulated by art. 14(1)(b) of the Federal Constitution?

(b) Whether the issue in this judicial review application is nonjusticiable under Part III, Second Schedule of the Federal Constitution?

C **Findings And Decision Of The High Court**

[9] On the issue of justiciability, the learned High Court Judge had made the following findings:

> The matter surrounding this JR (judicial review) application concerned a decision made pursuant to Part III of the FC (Federal Constitution)
D (Article 14 FC) which matter is non-justiciable as provided under s. 2, Part III of the Second Schedule of the FC. The provision clearly ousts the jurisdiction of the Court to decide on issues relating to the decision on the citizenship of the 2nd Applicants. This provision is applicable to application of citizenship under Article 14(1)(b) of FC.
>
> E ... In the case of *Ku Luwante (an infant) v. Government of Malaysia & Anor* [1978] 1 MLJ 92, page 95. His Lordship, Justice Yusoff in dealing with the case concerning application of citizenship by way of registration under Art. 15 of the FC had aptly made observation on the effect of Section 4 of Part III of the Second Schedule that it excludes the jurisdiction of the Court to entertain a claim for declaration of citizenship under Part III
F of the Federal Constitution.

[10] In addition, the learned High Court Judge found that the appellants had failed to satisfy the requirements of s. 1(e) of Part II of the Second Schedule of the Federal Constitution to obtain citizenship by operation of law for the following reasons:

G
> This is due to the fact that the biological father and mother of the 2nd Applicant could be ascertained and these facts were not even disputed by the 1st Applicant. Exhibit "A" to Enclosure 10 clearly provided that the 2nd Applicant's biological father is a citizen and his biological mother Rai-Putta is a citizen of Thailand. Both this couple had not been married at
H the time the 2nd Applicant was born. The Birth Certificate of the 2nd Applicant was endorsed with "Application Under Section 13 of the Births and Deaths Registration Act 1957.
>
> Clearly the citizenship of the 2nd Applicant is determinable as the 2nd Applicant's father is a Malaysian and the mother is of Thai origin and by virtue of paragraph 1(b) of Part II of the Second Schedule, the citizenship
I of the Applicant is determinable which a Thailand national.

[11] The learned High Court Judge referred to Chapter 1, s. 7.6 of the Nationality Act B. E. 2508 of Thailand, reproduced below:

> **Chapter 1**
>
> **Acquisition of Thai Nationality**
>
> Section 7.6. The following persons acquire Thai nationality by birth:
>
> (1) A person born of a father or a mother of Thai nationality, whether within or outside the Thai Kingdom;
>
> (2) A person born within the Thai Kingdom except the person under section 7 paragraph one.
>
> "Father" in (1) means also a person having been proved, in conformity with the Ministerial Regulation, that he is a biological father of the person even though he did not register marriage with the mother of the person or did not do a registration of legitimate child".

[12] The learned High Court Judge made a finding that there is no dispute that the second appellant was born within the Federation. However, the appellants have failed to fulfil the other requirement stipulated in s. 1(e) of Part II of the Second Schedule of the Federal Constitution.

[13] The learned High Court Judge concluded as follows:

> Therefore, the contention of the Applicants that the 2nd Applicant is a stateless person pursuant to s. 1(e) of Part II, of the Second Schedule of the FC could not hold water because from the facts that were disclosed to this Court as discussed above and by reason that the 2nd Applicant's biological mother being a Thai National and based on the NATIONALITY ACT B.E. 2508. Despite the 2nd Applicant being an illegitimate child, he has a right to be conferred a Thai citizenship and not a Malaysian citizenship even though he was born in Malaysia.

Grounds Of Appeal

[14] The grounds of appeal may be summarised as follows:

(a) The learned High Court Judge had erred in her finding that the appellants had failed to fulfil the conditions and requirement to acquire citizenship by operation of law under s. 1(e), Second Schedule, Part II and art. 14(1)(b) of the Federal Constitution.

(b) The learned High Court Judge had erred in taking into account the laws of Thailand which are not relevant to the issues in the instant case.

(c) The learned High Court Judge had erred in taking into account the illegitimacy of the second appellant in her interpretation of s. 1(e) Second Schedule, Part II and art. 14(1)(b) of the Federal Constitution.

(d) The learned High Court Judge had erred in her failure to appreciate that there are national and international provisions for the avoidance of statelessness.

(e) This is a nonjusticiable matter on which the court has no jurisdiction. Pursuant to Part III, Second Schedule of the Federal Constitution, the Federal Government has the sole discretion and power to grant Malaysian citizenship to persons applying under art. 14 of the Federal Constitution.

Our Judgment

[15] After considering the oral and written submissions of parties, the appeal records as well as relevant authorities, we find no merits in this appeal and consequently, we dismiss this appeal and affirm the decision of the High Court. Our reasons are set out below.

Issue Of Justiciability

[16] One of the issues raised before the High Court and in the memorandum of appeal, is whether the issue in this judicial review application is non justiciable under s. 2 of Part III of the Second Schedule of the Federal Constitution?

[17] Section 1 of Part III of the Second Schedule states as follows:

> The functions of the Federal Government under Part III of this Constitution shall be exercised by such Minister of that Government as the Yang di-Pertuan Agong may from time to time direct, and references in this Schedule to the Minister shall be construed accordingly.

[18] Section 2 of Part III of the Second Schedule states as follows:

> A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court.

[19] After a consideration of the authorities, we are of the opinion that the learned High Court Judge had erred in ruling that s. 2 of Part III of the Second Schedule to the Federal Constitution precludes the jurisdiction of the court.

[20] Firstly, the learned High Court Judge had misread *Ku Luwante*'s case. In *Ku Luwante (An Infant) v. Government of Malaysia & Anor* [1977] 1 LNS 49 Justice Yusoff had specifically addressed the issue of "whether the court is precluded from exercising its original jurisdiction in granting this declaration by reason of the 'ouster provision' in the Second Schedule of the Federal Constitution."

His Lordship had stated thus at p. 93:

> The effect of section 2 of Part Ill of the Second Schedule of the Federal Constitution (ouster provision) which purports to preclude the jurisdiction the court has been decided in a series of cases in our courts beginning with *Soon Kok Leong v. Minister of Interior, Malaysia* [1968] 2 MLJ 88 and recently in the decision of the court in *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 2 MLJ 168 and in the latter case, relevant authorities have been quite exhaustively dealt with. In those cases the courts have held that this ouster provision does not preclude the courts from entertaining an application for an order of *certiorari* to quash the decision of a statutory tribunal where there was an error of law apparent on the face of the record.

[21] After a review of relevant authorities, Justice Yusoff had stated thus at p. 95:

> For these reasons, I am of the view that in a proper case, the court is not precluded by reason of the ouster provision only, to entertain a claim for declaration that an individual is a citizen. But whether the court would entertain a claim for declaration that the plaintiff is eligible for registration as a citizen under a relevant provision of the Federal Constitution as it is sought in this case, involves different considerations and the court should also construe other provisions of the law relating to citizenship to determine the effect of such declaration.

[22] In *Ku Luwante*'s case, the finding of Justice Yusoff that the court has no jurisdiction to intervene was in respect of s. 4 of Part III of the Second Schedule, not the abovementioned s. 2. In addition, the finding was premised on the failure of the applicant to seek prior recourse to the Minister.

> ... The effect of section 4 of Part HI of the Second Schedule, in my opinion, excludes the jurisdiction of the court to entertain a claim for declaration of an individual's eligibility for registration as citizen under the Federal Constitution before recourse is had to the Minister who exercises the function of the Federal Government. Such a declaration is, in my view, hypothetical in nature and cannot be entertained by the court ... It would be premature for the court to intervene before the Minister had made his final decision.

[23] In *Ku Luwante*'s case, Justice Yusoff had referred to the case of *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 1 LNS 96; [1975] 2 MLJ 168, where Abdoolcader J was faced *inter alia* with the same issue of whether the ouster clause in s. 2 of Part III of the Second Schedule to the Constitution precludes the applicant from coming to court to seek an order of *certiorari*.

[24] Justice Abdoolcader held that the ouster provision in the Schedule to the Federal Constitution did not preclude the court from entertaining the application for an order of *certiorari*. Whether grounds for an order can be established and whether the application for *certiorari* will succeed are matters to be decided in the substantive motion itself.

A At pp. 170 and 171.

> I do not think there can be any doubt now that it is settled law that a finality or privative clause does not restrict in any way whatsoever the power of the courts to issue *certiorari* to quash for jurisdictional defect, error of law on the face of the record or manifest fraud. The same process
B of reasoning has even permitted the courts to interpret ouster clauses expressly referring to prohibition and *certiorari* and taking away the right to apply for such remedies as still permitting the grant of those remedies for lack of jurisdiction or the fraud must be manifest.
>
> ... It is clear that the *raison de tre* for the inroads into privative and ouster
C clauses is that the courts constitute the channel through which the King's justice is dispensed to his people and are accordingly the bastion of the rights of the individual. The courts must therefore necessarily be the ultimate bulwark against the excesses of the executive.

[25] Thus, on a careful consideration of the authorities abovementioned,
D we are of the view that s. 2 of Part III of the Second Schedule to the Constitution does not absolutely preclude the jurisdiction of the court.

Section 1(e) Of Part II, Second Schedule Of The Federal Constitution

[26] The second issue before us is whether the second appellant has satisfied the requirements stipulated in s. 1(e) of Part II, Second Schedule of
E the Federal Constitution, to be read with art. 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law?

[27] Article 14(1)(b) of the Federal Constitution encapsulates the requirement of citizenship by *jus soli* ie, by the place of birth; while s. 1(e) of Part II of the Second Schedule of the Federal Constitution ("not born a
F citizen of any country") encapsulates the requirement of citizenship by *jus sanguinis* ie, by blood or lineage.

[28] Thus, it would appear that the second appellant would need to satisfy both the requirements of *jus soli* and *jus sanguinis* in order to fulfil the
G requirements of art. 14(1)(b) and s. 1(e) of Part II, Second Schedule of the Federal Constitution.

(Refer to *Chin Kooi Nah v. Pendaftar Besar Kelahiran dan Kematian Malaysia* [2016] 1 CLJ 736; [2016] 7 MLJ 717).

[29] The doctrines of *jus soli* and *jus sanguinis* were explained in the case
H of *Singh v. Commonwealth of Australia* [2004] HCA 43, which was referred to in the case of *Chin Kooi Nah v. Pendaftar Besar Kelahiran dan Kematian Malaysia (supra)* at p. 764 (CLJ); p. 747 (MLJ) as follows:

I

By the late nineteenth century, international law recognised two well established rules for acquiring nationality by birth: *jus soli* and *jus sanguinis* (the Australian Legal Dictionary (1997) defines *jus soli* to mean: a right acquired by virtue of the soil or place of birth. Under this right, the nationality of a person is determined by the place of birth rather than parentage. Nationality is conferred by the state in which the birth takes place; and defines *jus sanguinis* to mean: a right of blood. Aright acquired by virtue of lineage. Under this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth.

[30] The relevant provisions in the Federal Constitution abovementioned are reproduced below:

Article 14. Citizenship by Operation of Law

(1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

(a) ...

(b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

[31] There is no dispute that documentary evidence confirms that the second appellant was born after Merdeka Day in the Federation ie, on 6 October 2010 in Hospital Tung Shin, Kuala Lumpur, Malaysia thus fulfilling the requirement of *jus soli* in art. 14(1)(b) of the Federal Constitution.

[32] The above provision is to be read with s. 1(e) Part II of the Second Schedule of the Federal Constitution as follows:

Citizenship By Operation Of Law Of Persons Born On Or After Malaysia Day

1. Subject to the provisions of Part Ill of this Constitution, the following persons born on or after Merdeka Day are citizens by operation of law, that is to say:

(a)

(b)

(c)

(d)

(e) every person born within the Federation **who is not born a citizen of any country** otherwise than by virtue of this paragraph. (emphasis added)

[33] It is a well-established principle of law that he who asserts must prove. This is particularly so in respect of facts which are within the appellants' knowledge. The burden of proof is on the appellants to establish on the balance of probabilities that the second appellant, "was not born a citizen of any country." Such rule of evidence is enunciated in s. 103 of the Evidence Act 1950 which provides:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any particular person.

[34] In the case of *Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [2008] 5 CLJ 42, it was held that the burden is on the applicant to prove his citizenship status by the relevant documents, the absence of which would be fatal to prove his claim.

[35] The burden of proof would only shift to the respondent to prove positively that the second appellant was born a citizen of a foreign country once the appellant has established a *prima facie* case. (Refer to *Toh Whye Teck v. The Happy World Ltd* [1953] 1 LNS 115; [1953] 19 MLJ 171).

[36] Section 1(e) of Part II, Second Schedule of the Federal Constitution confers citizenship to a person born by *jus sanguinis*, by reference to his blood or lineage. Thus, when a child has not, at birth acquired citizenship of any country, this would render him/her "not born a citizen of any country".

[37] In the instant case, although the second appellant was born in the Federation, he does not acquire citizenship from his Malaysian biological father – as being illegitimate, he acquires the citizenship of his biological mother who is a Thai national. The second appellant's biological mother named Rai-Putta Thippawan ("Rai Putta") is a citizen of Thailand. (exh. A of encl. 10) (Refer to *Foo Toon Aik v. Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 4 CLJ 613; [2012] 9 MLJ 573).

[38] The second appellant's lineage would only be traceable to his Malaysian biological father provided that his parents were in a lawful marriage. In the case of an illegitimate child, the word 'parent' is construed to refer to his biological mother.

Section 17 of Part III of the Federal Constitution states as follows:

> For the purposes of Part III of this Constitution references to a person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly section 19 of this Schedule shall not apply to such person.

[39] In the instant case, the identity and citizenship status of the second appellant's biological parents are known. There is no dispute that the second appellant's biological father is the first appellant and his biological mother, Rai-Putta is a Thai national. There is also no dispute that at the time of his birth, the second appellant's biological parents were not legally married.

[40] While second appellant's biological father is a Malaysian citizen, because of the second appellant's illegitimate status, the second appellant does not acquire the citizenship of his biological father. Instead, he acquires the citizenship of his biological mother, who it is not disputed is a Thai national. Thus, he cannot be said to be one, "who is not born a citizen of any country" pursuant to s. 1(e) of Part II, Second Schedule of the Federal Constitution.

[41] Thus on the available evidence, the appellants have failed to prove a *prima facie* case that the second appellant was "not born a citizen of any country". In the circumstances, we are of the opinion that the burden of proof has not shifted to the respondents to prove that the second appellant was conversely, born a citizen of another country (ie, Thailand). Thus, the issue of whether expert opinion is required by the respondents to prove that the second appellant had acquired Thai citizenship at birth does not arise.

[42] In conclusion, we are of the considered opinion that the second appellant has failed to satisfy the requirements stipulated in s. 1(e) of Part II, Second Schedule of the Federal Constitution, to obtain citizenship by operation of law.

[43] Accordingly, we dismiss this appeal and affirm the decision of the learned High Court Judge. We make no order as to costs.